UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Chief Bankruptcy Judge
Sacramento, California

June 7, 2004 at 9:00 a.m.

---

1. 02-28306-A-7 RICHARD LEWIS — HEARING - MOTION TO CONVERT CHAPTER 7 CASE TO ONE UNDER CHAPTER 11
HSM #1 — 5-21-04 [179]

Final Ruling: The parties have continued the hearing to June 14, 2004 at 9:00 a.m.

2. 04-23506-A-11 RICOR RACING AND DEVELOPMENT — HEARING - MOTION FOR LEAVE TO PAY DISCOUNTED ROYALTY PAYMENTS IN ACCORDANCE WITH PRE-BANKRUPTCY LICENSE AGREEMENT OR, ALTERNATIVELY, FOR RELIEF FROM AUTOMATIC STAY
GCH #1 — EDELBROCK CORPORATION, VS. — 5-18-04 [13]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the moving creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

3. 03-31931-A-7 LUCIENNE JENNINGS — CONT. HEARING - MOTION TO RECONSIDER DISMISSAL OF CHAPTER 7 AND REQUEST TO VACATE DISMISSAL
PGM #1 — 3-24-04 [94]

Tentative Ruling: On October 31, 2003 the debtor filed a petition for relief under chapter 13 but the case was converted to a petition under chapter 7 on January 26, 2004. On March 1, 2004 the chapter 7 trustee filed a "no asset" report.

On February 5, 2004 the debtor filed a handwritten letter asking this court to dismiss her case. The court considered the letter to be a motion and notice of a hearing was given to all originally scheduled creditors as well as the trustee. On February 8, 2004, he court served notice of the debtor's request for dismissal and of the March 1 hearing on that request. There was no opposition presented at the hearing and on March 3, 2004 this court filed its order dismissing the petition.

Damon Freedle and Eugene R. and Betty Van der Vlugt (the "movants,") ask this court to vacate the dismissal order. The creditors believe that the debtor failed to notice them of the case. On January 13, 2004 Damon Freedle filed a proof of claim for $9,500. On February 10, 2004 Eugene R. and Betty Van der Vlugt became aware of the bankruptcy filing and submitted a proof of claim for $30,000.

On February 5, 2004 the debtor sold her residence for $466,000. The movants argue that the debtor conducted this sale without approval or knowledge of this court. Whether or not conducted with court approval, the court notes that after deducting secured claims and the debtor's homestead exemption from the sale price, there is no remaining equity.

The debtor filed a response to the motion. She claims that she is not responsible for the Van der Vlugt's claim. Apparently, the debtor, in her capacity as an officer of Kingss do Brasil, Inc., signed a note payable to Eugene R. and Betty Van der Vlugt for $30,000. She claims she is not personally liable on this note and has attached the note and a copy of the check given by the movants' to made to Kingss do Brasil, Inc.

The motion will be denied.

First, the movants seem to think that the case was dismissed at the request of the chapter 13 trustee. It was not. It was dismissed at the request of the debtor after conversion to chapter 7.

Second, the notice of her request was served on all creditors listed on the mailing matrix filed by the debtor. Service was accomplished on February 6, 2004. Included among those served was Damon Freedle, one of the movants. The court held a hearing on the debtor's motion on March 1, 2004. No party in interest, including Mr. Freedle, appeared at the hearing to oppose dismissal.

Third, the note the debtor signed in favor of one of the Van der Vlugts was not signed in her personal capacity. She signed it as a corporate officer. This note was the corporation's debt and not the debtor's. As such, the debtor was not required to notice the Van der Vlugt's with her petition or the motion to dismiss.

Fourth, this is a no asset chapter 7 case. This is clear from the chapter 7 trustee's "no asset" report filed on March 31, 2004 and the debtor's schedules. Reinstating the case will accomplish nothing toward paying the movants. To the extent there were assets in the case, they have been abandoned to the debtor by virtue of the order entered on March 22 approving the trustee's no asset report, discharging the trustee, and closing the case. See 11 U.S.C. § 554(c).

The motion to reconsider will be denied.

4. 03-28040-A-7 GARY/MELODY KENNEY — CONT. HEARING - MOTION FOR RELIEF FROM AUTOMATIC STAY ETC
MHK #2 — 4-20-04 [59]
LE-JO, ET AL., VS.

Final Ruling: This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the debtor to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The debtors' and the

trustee's defaults are entered and the matter will be resolved without oral argument.

On July 18, 2003 the debtors filed a petition for relief under chapter 13 but the case was converted to a petition for relief under chapter 7 on May 3, 2004.

Creditors LE-JO, Inc. and Robert Swanston Corporation own 28 Lake Boulevard, Redding CA. This property was originally leased to debtor Gary Kenney's parents. In May 2000 the debtor signed a promissory note in the amount of $15,184.33 payable to Bay Area Realty, the movants' agent, as a condition to the debtors' assumption of the lease.

While in chapter 13, the debtors assumed the lease. However, as established in this motion, the debtors have defaulted in the payment of post-petition rent as well as in the cure of the pre-petition lease arrears.

The debtors have filed a notice of non-opposition to the motion.

Given the post-petition default in the payment of rent, and pursuant to 11 U.S.C. § 362(d)(1), there is cause for relief from the automatic stay to permit the movant to retake possession of the leased property and to terminate the tenancy of the debtors. No other relief is granted.

The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is ordered waived.

5. 04-21553-A-11 MV #1 — GRIFFIN CALIFORNIA ENTERPRISES INC. — HEARING - MOTION TO EXTEND TIME FOR DEBTOR-IN-POSSESSION TO ASSUME OR REJECT EXECUTORY CONTRACT 4-15-04 [30]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the trustee, the creditors, the United States Trustee, and all other potential respondents to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of these respondents are entered and the matter will be resolved without oral argument.

On February 18, 2004 the debtor filed a petition for relief under chapter 11.

Prior to the filing of the petition, a receiver had been appointed by a state court to take control of the debtor's property located at #70 Orange Tree Circle, Vacaville, California. In January 2004 the receiver entered into a one-year lease with a lessee. That is, the estate is the lessor of nonresidential real property.

The debtor-in-possession received a copy of this lease from the receiver on April 4, 2004 and has not had an opportunity to review in detail its terms. The debtor-in-possession argues that it needs more time to decide whether to assume or reject this lease.

11 U.S.C. § 365(d) does not appear to set a deadline for the assumption or rejection of an unexpired lease of nonresidential real property by a chapter 11 debtor in possession who is the lessor under the lease. 11 U.S.C. § 365(d)(3) merely requires the debtor to perform all lease terms except those exempted by

11 U.S.C. § 365(b)(2) pending confirmation.

Nonetheless, the court agrees it is a good idea to set a deadline for the assumption or rejection of the lease pursuant to 11 U.S.C. § 365(h)(1). Therefore, with the proviso that the debtor shall continue to perform the lease pending assumption or rejection, the debtor shall file a motion to assume, assume and assign, or reject the lease on or before July 16, 2004.

6. 04-22465-A-11 DENNIS/MAREN MURPHY
GCH #10

HEARING - DEBTORS' MOTION TO ASSUME NONRESIDENTIAL REAL PROPERTY LEASES
5-10-04 [103]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the trustee, the creditors, the United States Trustee, and all other potential respondents to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of these respondents are entered and the matter will be resolved without oral argument.

The debtors filed a petition for relief under chapter 11 on March 11, 2004.

The debtors are lessees of 166 acres of Alfalfa located at 8488 Bulkley Road, Dixon, California. The debtors lease this property from Alicia and Marie Ables.

The lease entitles the lessor to receive directly from any buyer 20% of the sale proceeds of the alfalfa harvested from the property. The lease terminates December 31, 2005. The debtors are current under the lease and project that they will remain current.

Pursuant to 11 U.S.C. 365(d) a debtor-in-possession may assume or reject an unexpired lease of nonresidential real property within 60 days after the date of the order for relief. Here, the debtors filed the motion within the 60-day deadline. There is no default to cure and the debtors are able to offer adequate assurance of future performance. Therefore, the motion will be granted.

7. 02-23768-A-13L OTIS JACKSON
04-2041 RPR #1
OTIS JACKSON, VS.
WELLS FARGO HOME MORTGAGE, ET AL.

CONT. HEARING - MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
4-14-04 [20]

Tentative Ruling: On March 2, 2004 Otis L. Jackson filed a declaration that is also labeled "Amended Complaint."

The debtor filed a petition for relief under chapter 13 on April 4, 2002. The debtor's third amended chapter 13 plan was confirmed on January 22, 2003.

The core of the debtor's complaint is that the Wells Fargo Mortgage, the debtor's home mortgage lender, violated the automatic stay and defamed his character by making false statements in documents filed with this court and recorded in the Sacramento County records. The debtor has named Wells Fargo Home Mortgage as well as John W. Klein and the Buckley Firm, the attorneys

representing Wells Fargo during the debtor's bankruptcy case.

On July 9, 2003 Wells Fargo filed a motion for relief from the automatic stay. At the hearing, the court was informed by counsel for Wells Fargo that Wells Fargo wished to voluntarily dismiss its motion even though the court had posted a tentative ruling that provided for the issuance of an adequate protection order. However, given the request for dismissal, and given that counsel for the debtor agreed to the dismissal, the tentative ruling did not become part of the record, the court entered a civil minute order dismissing the motion, and no adequate protection order was issued.

On September 10, 2003, Wells Fargo filed an ex parte motion to terminate the automatic stay. This motion was based on the debtor's alleged failure to make the July and August mortgage installment payments and the adequate protection order mentioned in the tentative ruling. However, as explained above, no such adequate protection order was issued by the court.

Therefore, in an order filed September 12, 2003, the court denied the ex parte motion. If Wells Fargo wished to be relieved from the automatic stay, the court instructed it to file a new motion for relief from the automatic stay and set it for hearing on notice to the debtor, the debtor's attorney, and the chapter 13 trustee pursuant to Local Bankruptcy Rule 9014-1(f).

The debtor's complaint states, among many other allegations, that on November 26, 2002 Wells Fargo recorded a notice of default, claiming the debtor's mortgage account was in arrears totaling $9,225.00. This filing was recorded in public records and was advertised in Sacramento County. Furthermore, on February 28, 2003 Wells Fargo recorded a notice of trustee's sale. Wells Fargo performed both of these actions without having received relief from the automatic stay.

The debtor is claiming that Wells Fargo should be liable for slander by causing the embarrassing and untrue details of his personal financial life to become public knowledge. The debtor claims to have spent a lifetime preparing for specific career goals and pursuing public sector employment. He is seeking $1.5 million for defamation of character and slander.

The debtor also asks this court to file a complaint with the state bar against John Klein. Furthermore, the debtor asks that the court admonish John Klein and the Buckley firm for their unsavory legal practices.

Wells Fargo, the Buckley Firm, and John W. Klein have moved for a motion to dismiss the debtor's complaint for failure to state a claim upon which relief may be granted.

The debtor does not list the separate causes of action against the defendants. However, the debtor may have a valid claim for the violation of the automatic stay of 11 U.S.C. § 362(h). The debtor is seeking punitive damages under this cause of action, but the debtor has failed to list his actual damages.

This motion to dismiss will be granted in part.

First, pursuant to California Civil Code § 47 the alleged slanderous or libelous statements made by the defendants in the motion filed in this case is privileged and no cause of action for it can be stated. Section 47 provides that a publication is privileged if it is made in a judicial proceeding or it was made in the course of the judicial proceeding. Therefore, any cause of

action for slander or libel will be dismissed for failure to state a claim.

This is without prejudice to relief under Fed.R.Bankr.P. 9011 if such relief is possible at this late date. See Fed.R.Bankr.P. 9011(c). Pursuant to Rule 9011, a debtor can bring a separate motion for sanctions if an attorney or unrepresented party made improper representations to the court. Cf. Gonazles v. Parks, 830 F.2d 1033, 1036 (9th Cir. 1987).

Second, this court will not enter a cause of action requiring it to file a complaint against the attorney defendants with the State Bar of California. The debtor has a right to file any complaint he believes has merit. He does not need to get permission for the court to file one and the court cannot be asked to file one on his behalf.

Third, this court will not order the various other remedies sought by the debtor, including:

1) Requiring Wells Fargo to prepare an insert and placing it into every mortgage bill explaining to the consumers their right to pursue complaints against Wells Fargo. This is not a class action. The debtor is limited to his remedy under section 362(h).

2) Requiring Wells Fargo to provide statistical data on how the Separation of Powers Doctrine applies to the parent company of Wells Fargo Home Mortgage and Wells Fargo National Bank. The court has no idea what this means.

3) Requiring the personal appearance of John Klein. This is not a cause of action. If the debtor wishes to command the appearance of a party or witness at a deposition or at trial, the debtor need only exercise his right to conduct discovery and/or issue a subpoena.

4) Requiring Wells Fargo to compensate the debtor for penalties associated with the late filings of personal income taxes for 2002 and 2003. The complaint alleges no causal connection between commencing a nonjudicial foreclosure proceeding in violation of the automatic stay and the debtor's failure to file timely income tax returns.

Despite the foregoing, the debtor may have a cause of action for violation of the automatic stay because of the commencement of the nonjudicial foreclosure without relief from the automatic stay. Pursuant to 11 U.S.C. § 362(h), an individual injured by any willful violation of a stay will recover actual damages and in appropriate circumstances punitive damages. Punitive damages may not be awarded absent actual damages. Stinson v. Bi-Rite Rest. Supply Inc. (In re Stinson), 295 B.R. 109, 122 (9th Cir. B.A.P. 2003). The Ninth Circuit has recently held that emotional distress damages does not fall under the definition of "actual damages." Dawson v. Washington Mutual Bank, F.A. (In re Dawson), 2004 U.S. App. LEXIS 9633, 15 (9th Cir. 2004). Furthermore, in Dawson court interpreted "actual damages" to mean economic damages. Id.

The complaint does not clearly state what damages caused by, and the amount of those damages, this alleged violation of the automatic stay.

The debtor must amend his complaint to state a claim for relief under section 362(h). The amended complaint should contain a short, plain statement of the acts allegedly done in violation of the automatic stay and identify the actual damages the debtor has suffered as a result of the that violation.

The debtor shall file an amended complaint and serve that complaint by mail no later than June 17, 2004. A responsive pleading shall be filed and served no later than June 28.

8.	02-23768-A-13L OTIS JACKSON 04-2041 LJB #1 OTIS JACKSON, VS. WELLS FARGO HOME MORTGAGE, ET AL.	CONT. HEARING - MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT 4-23-04 [26]

Tentative Ruling: On March 2, 2004 Otis L. Jackson filed a declaration that is also labeled "Amended Complaint."

The debtor filed a petition for relief under chapter 13 on April 4, 2002. The debtor's third amended chapter 13 plan was confirmed on January 22, 2003.

The core of the debtor's complaint is that the Wells Fargo Mortgage, the debtor's home mortgage lender, violated the automatic stay and defamed his character by making false statements in documents filed with this court and recorded in the Sacramento County records. The debtor has named Wells Fargo Home Mortgage as well as John W. Klein and the Buckley Firm, the attorneys representing Wells Fargo during the debtor's bankruptcy case.

On July 9, 2003 Wells Fargo filed a motion for relief from the automatic stay. At the hearing, the court was informed by counsel for Wells Fargo that Wells Fargo wished to voluntarily dismiss its motion even though the court had posted a tentative ruling that provided for the issuance of an adequate protection order. However, given the request for dismissal, and given that counsel for the debtor agreed to the dismissal, the tentative ruling did not become part of the record, the court entered a civil minute order dismissing the motion, and no adequate protection order was issued.

On September 10, 2003, Wells Fargo filed an ex parte motion to terminate the automatic stay. This motion was based on the debtor's alleged failure to make the July and August mortgage installment payments and the adequate protection order mentioned in the tentative ruling. However, as explained above, no such adequate protection order was issued by the court.

Therefore, in an order filed September 12, 2003, the court denied the ex parte motion. If Wells Fargo wished to be relieved from the automatic stay, the court instructed it to file a new motion for relief from the automatic stay and set it for hearing on notice to the debtor, the debtor's attorney, and the chapter 13 trustee pursuant to Local Bankruptcy Rule 9014-1(f).

The debtor's complaint states, among many other allegations, that on November 26, 2002 Wells Fargo recorded a notice of default, claiming the debtor's mortgage account was in arrears totaling $9,225.00. This filing was recorded in public records and was advertised in Sacramento County. Furthermore, on February 28, 2003 Wells Fargo recorded a notice of trustee's sale. Wells Fargo performed both of these actions without having received relief from the automatic stay.

The debtor is claiming that Wells Fargo should be liable for slander by causing the embarrassing and untrue details of his personal financial life to become public knowledge. The debtor claims to have spent a lifetime preparing for

specific career goals and pursuing public sector employment. He is seeking $1.5 million for defamation of character and slander.

The debtor also asks this court to file a complaint with the state bar against John Klein. Furthermore, the debtor asks that the court admonish John Klein and the Buckley firm for their unsavory legal practices.

Wells Fargo, the Buckley Firm, and John W. Klein have moved for a motion to dismiss the debtor's complaint for failure to state a claim upon which relief may be granted.

The debtor does not list the separate causes of action against the defendants. However, the debtor may have a valid claim for the violation of the automatic stay of 11 U.S.C. § 362(h). The debtor is seeking punitive damages under this cause of action, but the debtor has failed to list his actual damages.

This motion to dismiss will be granted in part.

First, pursuant to California Civil Code § 47 the alleged slanderous or libelous statements made by the defendants in the motion filed in this case is privileged and no cause of action for it can be stated. Section 47 provides that a publication is privileged if it is made in a judicial proceeding or it was made in the course of the judicial proceeding. Therefore, any cause of action for slander or libel will be dismissed for failure to state a claim.

This is without prejudice to relief under Fed.R.Bankr.P. 9011 if such relief is possible at this late date. See Fed.R.Bankr.P. 9011(c). Pursuant to Rule 9011, a debtor can bring a separate motion for sanctions if an attorney or unrepresented party made improper representations to the court. Cf. Gonazles v. Parks, 830 F.2d 1033, 1036 (9th Cir. 1987).

Second, this court will not enter a cause of action requiring it to file a complaint against the attorney defendants with the State Bar of California. The debtor has a right to file any complaint he believes has merit. He does not need to get permission for the court to file one and the court cannot be asked to file one on his behalf.

Third, this court will not order the various other remedies sought by the debtor, including:

1) Requiring Wells Fargo to prepare an insert and placing it into every mortgage bill explaining to the consumers their right to pursue complaints against Wells Fargo. This is not a class action. The debtor is limited to his remedy under section 362(h).

2) Requiring Wells Fargo to provide statistical data on how the Separation of Powers Doctrine applies to the parent company of Wells Fargo Home Mortgage and Wells Fargo National Bank. The court has no idea what this means.

3) Requiring the personal appearance of John Klein. This is not a cause of action. If the debtor wishes to command the appearance of a party or witness at a deposition or at trial, the debtor need only exercise his right to conduct discovery and/or issue a subpoena.

4) Requiring Wells Fargo to compensate the debtor for penalties associated with the late filings of personal income taxes for 2002 and 2003. The complaint alleges no causal connection between commencing a nonjudicial foreclosure

proceeding in violation of the automatic stay and the debtor's failure to file timely income tax returns.

Despite the foregoing, the debtor may have a cause of action for violation of the automatic stay because of the commencement of the nonjudicial foreclosure without relief from the automatic stay. Pursuant to 11 U.S.C. § 362(h), an individual injured by any willful violation of a stay will recover actual damages and in appropriate circumstances punitive damages. Punitive damages may not be awarded absent actual damages. Stinson v. Bi-Rite Rest. Supply Inc. (In re Stinson), 295 B.R. 109, 122 (9th Cir. B.A.P. 2003). The Ninth Circuit has recently held that emotional distress damages does not fall under the definition of "actual damages." Dawson v. Washington Mutual Bank, F.A. (In re Dawson), 2004 U.S. App. LEXIS 9633, 15 (9th Cir. 2004). Furthermore, in Dawson court interpreted "actual damages" to mean economic damages. Id.

The complaint does not clearly state what damages caused by, and the amount of those damages, this alleged violation of the automatic stay.

The debtor must amend his complaint to state a claim for relief under section 362(h). The amended complaint should contain a short, plain statement of the acts allegedly done in violation of the automatic stay and identify the actual damages the debtor has suffered as a result of the that violation.

The debtor shall file an amended complaint and serve that complaint by mail no later than June 17, 2004. A responsive pleading shall be filed and served no later than June 28.

9. 03-33368-A-7 WALTER/KATIE FRANKLIN — HEARING - MOTION FOR RELIEF FROM AUTOMATIC STAY
SW #2
GMAC, VS. — 5-12-04 [54]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the moving creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

10. 01-22875-A-7 ROBERT BOGETTI & SONS I — HEARING - MOTION FOR RELIEF FROM AUTOMATIC STAY ETC
H&M #1
SN COMMERCIAL, VS. — 5-20-04 [96]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the moving creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

11. 02-27878-A-7 JAIME/KATHLEEN DAVALOS
UST #2

HEARING - MOTION OF THE U.S. TRUSTEE FOR SECOND EXTENSION OF TIME FOR FILING A COMPLAINT OBJECTING TO DEBTORS' DISCHARGE OR FOR FILING A MOTION TO DISMISS
5-5-04 [119]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the trustee, the debtors, the creditors, and all other potential respondents to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of these respondents are entered and the matter will be resolved without oral argument.

On July 16, 2002 the debtors filed a petition for relief under chapter 13 but the case was converted to a petition under chapter 7 on November 18, 2003. Hank Spacone was appointed the chapter 7 trustee.

The deadline to file a complaint to object to the debtors' discharge and for bringing a motion to dismiss under 11 U.S.C. § 707(b) is May 17, 2004. This court granted an earlier motion to extend these deadlines on April 27, 2004.

At that hearing this court noted that American Attorney Center was to continue to remain counsel until there was an order authorizing withdrawal. The AAC did file a motion to withdraw and it is being considered with this motion.

Kathleen Manor, formerly known as Kathleen Davlos, recently had a baby and needs further time to recover. Due to AAC's pending motion to withdraw and Ms. Manor's need to recuperate, the United States Trustee has put off scheduling the 2004 examination of the debtors.

The trustee filed this motion to extend time before the deadline to file an objection to discharge or a motion to dismiss pursuant to section 707(b) had expired. See Fed.R.Bankr.P. 4004. The court finds cause to extend again the time to object to discharge pursuant to 11 U.S.C. § 727 or for filing a motion to dismiss pursuant to 11 U.S.C. § 707(b). These deadlines are extended to July 26, 2004.

12. 02-27878-A-7 JAIME KATHLEEN DAVALOS
AAC #3

HEARING - DEBTORS' ATTORNEY'S MOTION TO WITHDRAW AS ATTORNEY OF RECORD
4-29-04 [112]

Tentative Ruling: Michael E. O'Neal, the president of American Attorney Center, P.C., requests that his law firm be permitted to withdraw from representing the debtors in this case.

The movant argues that the debtors' actions have rendered it impossible to participate in the case and assist the debtors in any meaningful way. The debtors apparently converted their case from chapter 13 to chapter 7 without the assistance of the attorney or even the attorney's knowledge.

The rules concerning withdrawal have been liberally construed to protect clients. 1 Witkin, California Procedure, § 100, "Attorney," (1996) (citing Vann v. Shilleh, 54 Cal. App.3d 192, 197 (1978). An attorney has no right to

withdraw until steps have been take to avoid prejudice to the client's rights. Id.

The movant has filed a substitution of attorney on December 31. 2003. The substitution simply states that the debtors would be representing themselves. The substitution is signed by both debtors. Consistent with this, the debtors have not objected to the withdrawal of their attorney.

However, the motion does not state what steps have been taken to avoid prejudice to the debtors. There is the potential for great prejudice at this. Mrs. Davalos, because of a medical condition, cannot represent herself at this time. When she is able, the U.S. Trustee intends to conduct her Rule 2004 examination. Depending on the information elicited at the examination, the U.S. Trustee may seek the dismissal of the petition or file a complaint objecting to the discharge of the debtors.

The motion will be denied without prejudice to the renewal of the motion upon the completion of the debtors' examinations and resolution of any motion to dismiss pursuant to section 707(b).

13. 01-22879-A-7 ROBERT BOGETTI & SONS II — HEARING - MOTION FOR RELIEF FROM AUTOMATIC STAY ETC 5-20-04 [92]
H&M #1
SN COMMERCIAL, VS.

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the moving creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

14. 03-32180-A-11 JOMED, INC. — HEARING - FIRST APPLICATION OF COUDERT BROTHERS FOR APPROVAL OF INTERIM COMPENSATION AND REIMBURSEMENT OF EXPENSES ($15,067.50 FEES; $123.95 COSTS) 5-10-04 [250]

Final Ruling: This compensation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the debtor, the United States Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

On November 7, 2003 Jomed Inc. and Jomed USA, Inc. filed a petition for relief under chapter 11. The cases are being jointly administered.

On November 20, 2003 the debtors filed an application to employ Coudert Brothers LLP. The court approved this employment effective November 7, 2003 in an order dated November 20, 2003.

Coudert Brothers now brings its first application seeking approval of interim compensation for services and reimbursement for expenses incurred. The period covered by this application is November 7, 2003 through March 31, 2004.

The firm received a $25,050.05 retainer from the debtors prior to the petition date. The application seeks total fees of $15,067.50 and reimbursement of expenses in the amount of $123.95. This application also seeks approval of interim payments previously applied from the retainer in the aggregate amount of $13,684.70 on account of fees and expenses. This court entered an interim fee order on March 3, 2004.

Attached to the motion are declarations and time records detailing the services provided to the debtors. The services provided are broken down into categories and included: 1) formulation of a chapter 11 plan; 2) responding to inquiries from the debtors' counsel in connection with "first day" motions and the adversary proceeding filed on behalf of Jomed Inc; 3) responding to inquires from the bankruptcy trustee of the debtors' parent corporation; 4) preparing required disclosure regarding employment of Coudert Brothers as special counsel; 5) assisting in the review of court procedures and local rules; and 6) preparing the declaration in support of the debtors' application for Knudsen Order authorizing the interim payment of fees.

Coudert Brothers seeks an order authorizing immediate payment of the difference between the amounts of fees and costs of this application and the amounts previously paid. All fees approved will be paid from the balance in the retainer, $11,365.35.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." Here, the services provided were necessary and the customary rates charged by the firm range from $370-$650 for members and counsel, $175 to $400 for associates and $85 to $175 for paraprofessionals. The $123.95 in costs consists of necessary costs for federal express and research related expense. No one has objected to this motion.

The motion will be granted. The court will authorize the payment of cost and interim fees in the amount of $15,191.14 and will approve the interim payments in the total amount of $13,684.70.

15. 03-32180-A-11 JOMED INC.

HEARING - FIRST INTERIM APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES AS DUTCH SPECIAL COUNSEL TO DEBTORS ($900.00 FEES; $482.00 EXPENSES) 5-11-04 [263]

Tentative Ruling: On November 7, 2003 Jomed Inc. and Jomed USA, Inc. filed a petition for relief under chapter 11. The cases are being jointly administered.

On February 26, 2004 this court authorized Blauw Tekstra Uding ("BTU") as special counsel to represent the debtors in this case effective January 26, 2004.

BTU brings this first interim application for compensation and reimbursement of expenses. BTU seeks approval of total fees in the amount of £900.00 and

reimbursement of expenses in the amount of £482.00 to be paid in US dollars at the exchange rate in effect on the business day prior to the date of payment.

BTU has attached a single page time record. It simply states that attorney Ton Tekstra charges an hourly rate of £200 and billed 4.5 hours. Nothing is authenticated by a declaration or affidavit. While there is apparently an itemization of the expenses and services, it is written in a foreign language, presumably Dutch.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The court cannot approve these fees or costs. There is no declaration attached to the motion stating that Ton Tekstra personally performed these services and the itemized bill is written in a foreign language.

Based on these deficiencies the court cannot approve the fees or expenses. The motion will be denied.

16. 03-32180-A-11 JOMED, INC.

HEARING - FIRST INTERIM APPLICATION OF PERRY-SMITH LLP FOR FIRST INTERIM APPLICATION FOR COMPENSATION AS TAX ADVISORS TO DEBTORS ($19,195.00)
5-11-04 [264]

Final Ruling: This compensation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the debtor, the United States Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

On November 7, 2003 Jomed Inc. and Jomed USA, Inc. filed a petition for relief under chapter 11. The cases are being jointly administered.

On November 20, 2004 the court authorized the movant, Perry Smith LLP, to represent the debtors effective November 7, 2003.

Perry Smith moves for its first interim application for compensation and reimbursement of expenses as tax advisors to the debtors. This application seeks approval of total fees in the amount of $19,195.00. The application also seeks approval of partial payments previously received by the movant pursuant to this court's March 3, 2004 order. The fees previously received totaled $17,275.00. The movant seeks the immediate payment of the difference between the amount of fees allowed in this application and the interim payments already received, or $1,919.50.

Attached to the motion are records detailing the time each accountant billed, the rates charged, and the corresponding dates. However, these records do not describe the services that were provided. The motion itself provides a narrative of the services provided during the preparation of the debtor's 2002 and 2003 federal and state tax returns including: 1) obtaining data from the debtor's personnel; 2) reviewing this data and 3) participating in numerous discussion with the debtor concerning the reliability of the data. This data

was then used to prepare the debtors income tax returns.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses."

The court finds that the compensation sought is reasonable and the preparation of the debtor's tax return was a necessary service. Perry-Smith has not asked for reimbursement of expenses incurred during the preparation of the debtors' tax returns.

17. 03-32180-A-11 JOMED, INC.
DB #3

HEARING - FIRST INTERIM APPLICATION OF COUNSEL DOWNEY, BRAND FOR APPROVAL OF COMPENSATION AND REIMBURSEMENT OF EXPENSES ($55,293.50 FEES; $574.86 EXPENSES)
5-10-04 [249]

Final Ruling: This compensation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the debtor, the United States Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

On November 7, 2003 Jomed Inc. and Jomed USA, Inc. filed a petition for relief under chapter 11. The cases are being jointly administered.

On December 11, 2003 this court authorized the Official Committee of Unsecured Creditors to employ Downey Brand LLP as counsel effective November 7, 2003.

Downey Brand requests that the court enter an order approving fees of $55,293.50 and costs of $574.86 incurred from November 7, 2003 through March 31, 2004.

On March 3, 2004 the court entered an order granting an application for an order authorizing payment of fees. The movant has been providing monthly billing statements and sought an initial interim payment of $12,433.50, representing 90% of its fees incurred through the period ending December 31, 2003.

Attached to the motion are declarations and time records detailing the services provided to the committee. The services provided are broken down into categories and include: 1) asset disposition; 2) case administration; 3) claims administrative and objections; 4) fee and employment applications; 5) fee and employment objections; 6) meeting of creditors; 7) plan and disclosure statements; 8) relief from stay proceedings; 9) business analysis; 10) data analysis; 11) litigation; and 12) Jomed, NV's § 304 petition.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." Here, the services provided were necessary and the rates charged by the firm on this case range from $160.00 to $325.00. The $574.86 in costs consists of necessary costs for

courier, federal express, and telephonic appearances. No one has objected to this motion.

The motion will be granted. The court will enter an order approving fees of $55,293.50 and costs of $574.89 and will authorize the payment of $5,266.10 representing the fees incurred which remain unpaid pursuant to the March 3, 2004 order.

18. 03-32180-A-11 JOMED, INC.
HEW #17

HEARING - FIRST INTERIM APPLICATION OF HELLER, EHRMAN, WHITE & MCAULIFFE FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES AS COUNSEL TO DEBTORS
$351,296.00 FEES; $12,348.37)
5-10-04 [248]

Final Ruling: This compensation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the debtor, the United States Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

On November 7, 2003 Jomed Inc. and Jomed USA, Inc. filed a petition for relief under chapter 11. The cases are being jointly administered.

On November 20, 2003 the court authorized the movant to represent the debtors.

Heller Ehrman White & McAulliffe LLP, counsel to Jomed Inc. and Jomed USA, moves for its first interim application for compensation and reimbursement of expenses. The fee application seeks approval of fees in the amount of $351,269.00 and reimbursement of expenses in the amount of $12,348.37. Furthermore, the movant also seeks approval of partial payments previously received in the sum of $326,308.66 pursuant to this court's order dated March 3, 2004.

Attached to the motion are declarations, time records, and a summary of invoices detailing the services provided to the debtors. The services provided are broken into categories and include: 1) affiliates relations; 2) appointment and compensation; 3) asset recovery; 4) asset disposition; 5) business operations; 6) claims administration and objections; 7) C-Pump Business; 8) Reitan License dispute; 9) creditor communications; 10) employee relations; 11) general administration; 12) insurance matters; 13) leases; 14) licenses and non-lease executory contracts; 15) litigation; 16) operating and financial reporting; 17) other motions, applications and procedures; 18) plan confirmation and disclosure statement; 19) regulatory matters; 20) relief from the stay motions; and 21) tax matters.

The hourly rates charged for associates on this case ranged from $300 an hour to $590.00 an hour. While these rates are high in relation to the rates charged by Sacramento area bankruptcy attorneys, the rates are typical of those charged by firms with national bankruptcy practices. These debtors conduct or conducted national and international businesses. Their business affairs are or were complex and implicate not only California law, but federal nonbankruptcy law, foreign law, and the laws of other states. Given this, the selection of

counsel with a national practice was appropriate.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." Here, the services actually provided and were necessary. The $12,348.37 in costs consists of necessary costs for travel, facsimile, photocopies and telephone calls.

The motion will be granted. The court will authorize the movant's fees and expenses on an interim basis in the amounts of $351,296.00 and $12,348.37, will approve the partial payments previously made pursuant to the interim fee order in the amount of $326,308.66 and will direct the debtors to pay the balance of $326,307.71.

19. 03-24983-A-7 GEORGE/GALE MARTIN — HEARING - MOTION TO SELL REAL PROPERTY 5-10-04 [46]
SMR #1

Tentative Ruling: Stephen M. Reynolds, the chapter 7 trustee, in this case seeks an order to sell the real property belonging to the estate.

On May 2, 2003 the debtors filed a petition for relief under chapter 13 but the case was converted to a petition under chapter 7 on February 17, 2004.

The debtors own real property located at 4095 Oakwood Drive, Fairfield, California. The property is subject to a note and a first deed of trust in favor of Countrywide Home Loans. As of the petition date the note balance was approximately $302,955.32.

The trustee seeks to sell this property and has obtained an offer to purchase it for $440,000. A copy of the offer with the accepted counter offer is attached to the trustee's declaration.

The motion to sell the property will be approved subject to overbids. The sale is in the best interest of the creditors. The court will determine overbid increments and terms of the sale at the hearing.

20. 01-23887-A-7 BALWINDER/GURPREET JHOOTY — HEARING - MOTION TO DETERMINE ADMINISTRATIVE CLAIM 5-7-04 [266]

Tentative Ruling: On April 3, 2003 the debtors filed a petition for relief under chapter 7. Michael P. Dacquisto was appointed to serve as the trustee.

On June 4, 2001 the debtors converted their petition to one under chapter 13. On March 4, 2002 the court confirmed the debtors' third amended chapter 13 plan.

The debtors operated a convenience store and gas station located in Shasta County and known as the Rocky Ledge Food Mart. Prior to the filing of the petition, the debtors opened an account with Southern Counties Oil Co., for delivery of petroleum products. The debtors failed to pay for deliveries made on October 20, 2001 and October 27, 2001. The deliveries amounted to $4,497.51.

On June 13, 2002 the court reconverted the debtors' case to a chapter 7 due to their inability to make chapter 13 plan payments. On June 13, 2003 SCO

obtained a judgement against the debtor Balwinder Jhooty in the amount of $7,342.86. On July 22, 2003 SCO recorded an abstract of judgment in Sacramento County.

On September 29, 2003 the court approved the sale of estate property located at 7549 Orange Drive, Citrus Heights, California, 95610. The trustee did not know of the SCO abstract of judgment until after he had been granted authorization to sell 7549 Orange Drive.

The trustee contacted SCO's counsel. SCO contended that its judgment lien was valid despite the trustee's position that it violated the automatic stay.

SCO's counsel agreed to a partial release of its lien to allow the sale of the property to close on time, conditioned on SCO's claim of lien attaching to the proceeds of the sale. The lien would attach to the proceeds to the same extent and priority as it existed prior to the close of sale.

The state court judgment and the recording of the abstract of judgment by SCO violated the automatic stay pursuant to 11 U.S.C. § 362(a)(1) and § 362(a)(4). As such, the lien and judgment are void.

SCO is alternatively seeking its claim as an administrative expense in the amount of $7,342.86, based on $4,697.51 in principal and $1,785.03 in interest at the contract rate awarded in the state court.

Pursuant to 11 U.S.C. § 503(b) actual and necessary costs and expenses of preserving the estate are allowed as administrative expenses. Here, the petroleum deliveries were necessary to preserve the debtors business, the Rocky Ledge Food Mart.

The trustee objects to SCO's claim as an administrative expense. The trustee submits that its administrative claim should be limited to $4,497.51, the amount set forth in SCO's invoices. This court agrees. If the court were to adopt SCO's value of the administrative expense, including the interest, it would be rewarding SCO for its violation of the automatic stay in obtaining a state court judgment that included interest. However, the court agrees that interest accrues on the claim but at the federal judgment rate, 28 U.S.C. § 1961, the rate applicable if no state court action had been filed.

The motion will be approved in part. First, the judgment lien is invalid and unenforceable because it was gained in violation of the automatic stay. Second, SCO is entitled to an administrative claim of $4,497.51 plus interest at the federal judgment rate from the date each invoice was owed.

21. 04-23290-A-11 VERNON STRAWMIER — HEARING - MOTION FOR RELIEF FROM AUTOMATIC STAY
NII #1
GENERAL ELECTRIC CAPITAL CORP., VS. — 5-10-04 [50]

Final Ruling: The parties have continued the hearing to June 21, 2004 at 9:00 a.m.

22. 04-23290-A-11 VERNON STRAWMIER — HEARING - MOTION FOR RELIEF FROM AUTOMATIC STAY
NII #2
GENERAL ELECTRIC CAPITAL CORP., VS. — 5-10-04 [44]

Final Ruling: The parties have continued the hearing to June 21, 2004 at 9:00 a.m.

23. 98-29093-A-7 EDWARD PESTANA — CONT. HEARING - DEBTOR'S VERIFIED MOTION TO AVOID JUDICIAL LIENS AGAINST DEBTOR'S RESIDENCE, AND MOTION TO VALUE LIENS
MHK #22 — 3-29-04 [494]

Final Ruling: The parties have continued the hearing to July 12, 2004 at 9:00 a.m.

24. 03-29099-A-11 NELLY HARRIS — HEARING - MOTION OF RUSSELL F. TOLLEFSON, CPA FOR THE DEBTOR, FOR INTERIM COMPENSATION AND FOR REIMBURSEMENT OF EXPENSES ($5,033.00)
FEC #9 — 4-30-04 [109]

Final Ruling: This compensation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) (effective Dec. 23, 2002). The failure of the trustee, the debtor, the United States Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

On August 15, 2003 the debtor filed a petition for relief under chapter 13, but the case was converted to a petition for relief under chapter 11.

On November 12, 2003 the court entered an order approving the debtor's motion to employ Russell C. Tollefson, a certified public accountant, as an accountant for the debtor in possession. Mr. Tollefson has provided 75.50 hours of services for the months of October 2003 through February 2004. Mr. Tollefson now seeks compensation totaling $5,033.00 and expenses totaling $39.00.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." Mr. Tollefson provided necessary services including conferring with the debtor and her counsel and preparing monthly operating reports. Furthermore, Mr. Tollefson incurred necessary expenses, including facsimile and postage expenses.

The motion will be approved. The compensation and reimbursement sought is for necessary services and expenses. Furthermore, the compensation is reasonable.

25. 03-21302-A-7 STEVEN/ROXANNE ADAMS — HEARING - MOTION TO AVOID THE FIXING OF LIENS
SAC #1
VS. SAFE CREDIT UNION — 5-5-04 [27]

Tentative Ruling: The motion will be dismissed without prejudice because its factual assertions are not supported by any admissible evidence. The evidence offered consists of a declaration by the debtor's attorney and the debtor's schedules.

As to counsel's declaration, he has no personal or expert knowledge concerning the value of the subject property, the amount of the unavoidable liens, or the debtor's entitlement to an exemption in the subject property.

As to the schedules, the debtor's statements in them are not admissible merely because they happened to have been signed under penalty of perjury and filed with the court. The debtor's statements in the schedules are hearsay. Fed.R.Evid. 802. While it may seem incongruous to conclude that the schedules are hearsay but that a declaration filed under penalty of perjury by the debtor in this contested matter is not hearsay, the declaration is permitted by Fed.R.Civ.P. 43(e) as incorporated by Fed.R.Bankr.P. 9017.

Because the debtor is offering this evidence, the statements is the schedules are not admissible as admissions. Fed.R.Evid. 801. If the schedules are taken as prior testimony, they are not admissible because the debtor is not unavailable to testify. Fed.R.Evid. 804.

The fact that no party in interest objected to the exemption upon which this motion is based within the time required by Fed.R.Bankr.P. 4003(b) and 11 U.S.C. § 522(l) does not entitle the debtor to relief under 11 U.S.C. § 522(f)(1)(A). See In re Mohring, 142 B.R. 389 (Bankr. E.D. Cal. 1992), *affirmed*, 153 B.R. 601 (B.A.P. 9th Cir. 1993), *affirmed*, 24 F.3d 247 (9th Cir. 1994) (it is not enough to show that an exemption was claimed on Schedule C without objection; to avoid a judicial lien the debtor must prove entitlement to the exemption).

In short, the motion must be accompanied by a declaration from someone with personal knowledge of the relevant facts and that proves the value of the subject property, the amount of the exemption, entitlement to the exemption, and the amount owed to holders of unavoidable liens.

26. 03-21302-A-7 STEVEN/ROXANNE ADAMS — HEARING - MOTION TO AVOID THE FIXING OF LIENS
SAC #2
VS. SACRAMENTO INFINITI — 5-5-04 [23]

Tentative Ruling: The motion will be dismissed without prejudice because its factual assertions are not supported by any admissible evidence. The evidence offered consists of a declaration by the debtor's attorney and the debtor's schedules.

As to counsel's declaration, he has no personal or expert knowledge concerning the value of the subject property, the amount of the unavoidable liens, or the debtor's entitlement to an exemption in the subject property.

As to the schedules, the debtor's statements in them are not admissible merely because they happened to have been signed under penalty of perjury and filed with the court. The debtor's statements in the schedules are hearsay. Fed.R.Evid. 802. While it may seem incongruous to conclude that the schedules are hearsay but that a declaration filed under penalty of perjury by the debtor in this contested matter is not hearsay, the declaration is permitted by Fed.R.Civ.P. 43(e) as incorporated by Fed.R.Bankr.P. 9017.

Because the debtor is offering this evidence, the statements is the schedules are not admissible as admissions. Fed.R.Evid. 801. If the schedules are taken as prior testimony, they are not admissible because the debtor is not unavailable to testify. Fed.R.Evid. 804.

The fact that no party in interest objected to the exemption upon which this motion is based within the time required by Fed.R.Bankr.P. 4003(b) and 11 U.S.C. § 522(l) does not entitle the debtor to relief under 11 U.S.C. § 522(f)(1)(A). See In re Mohring, 142 B.R. 389 (Bankr. E.D. Cal. 1992),

affirmed, 153 B.R. 601 (B.A.P. 9th Cir. 1993), *affirmed*, 24 F.3d 247 (9th Cir. 1994) (it is not enough to show that an exemption was claimed on Schedule C without objection; to avoid a judicial lien the debtor must prove entitlement to the exemption).

In short, the motion must be accompanied by a declaration from someone with personal knowledge of the relevant facts and that proves the value of the subject property, the amount of the exemption, entitlement to the exemption, and the amount owed to holders of unavoidable liens.